BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DAVID K. MASON	)	
Claimant	)	
v.	)	
	)	Docket No. 1,073,092
PAUL M. AND CHERYL A. LEIKER	)	
d/b/a LEIKER FARM AND TRUCKING	)	
AND JORDAN LEIKER	)	
Respondent	)	
and	)	
	)	
RIVERPORT INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the June 26, 2015, preliminary hearing Order entered by Special Administrative Law Judge (SALJ) C. Stanley Nelson. Claimant appears by counsel, Matthew L. Bretz. Respondent appears by counsel, Christopher J. Shepard.

ISSUES

Claimant's original application for hearing alleged he suffered right shoulder and left knee injuries on January 16, 2015, while working for Leiker Farms & Trucking. Claimant filed an amended application for hearing in April 2015, listing his employer as Paul and Cheryl Leiker (Paul and Cheryl) d/b/a Leiker Farm & Trucking and Jordan Lieker (Jordan). Another amended application for hearing was filed on July 2, 2015, after the SALJ issued his order, adding Jet Investments, LLC and Leiker Farms &Trucking, LLC as claimant's employers.

In his June 26, 2015, preliminary hearing Order, the SALJ found:

> That on 1/16/15 Claimant was employed by and paid by Paul Leiker to drive Paul's semi truck to pull a grain trailer and haul grain from an elevator to White Energy, an ethanol plant in Russell, KS, which was operating under Jordan Leiker's ICC . . . that the applicable 1099s and W-2s for 2014 do not indicate that Paul and his wife's 2014 total gross annual payroll excluding moneys paid to family members was even one third of $20,000.[1]

[1] SALJ Order (June 26, 2015) at 5.

Claimant contends he was originally hired by Paul, but was working for Jordan at the time of his accident. Claimant argues Jordan held the contractual agreement for the work claimant performed; the commercial trucks used to perform the work were under Jordan's KCC registration and he was the motor carrier; Jordan told claimant when and where to work, and how to complete the job. Claimant contends he was paid by Paul, but the money came from Jordan. Claimant alleges Jordan paid more than $20,000 in wages during 2014 and requests the Board to determine the Workers Compensation Act (Act) applies to claimant's accidental injury.

Respondent argues the evidence shows claimant's employer, Paul and Cheryl, did not pay over $20,000 in wages for 2014 and requests the Board to affirm the SALJ's decision.

The issue is: was claimant's employment at the time of his injury covered by the Act? Specifically, did claimant's employer have a total gross annual payroll for the preceding calendar year (2014) of not more than $20,000 for all employees and have an estimated total gross annual payroll for the current calendar year (2015) of more than $20,000 for all employees, excluding employees who are members of the employer's family by marriage or consanguinity?

FINDINGS OF FACT

Claimant's Testimony

Claimant hauled grain from local elevators to ethanol plants. He testified that he was asked to drive the truck and haul the grain by Jordan, son of Paul and Cheryl. The truck claimant drove was owned by Paul, but claimant also drove Jordan's truck. Claimant testified he injured his right shoulder and left knee when he fell off a grain truck on January 16, 2015. Claimant fell when he and Jordan checked to see why the truck was losing grain. On January 16, 2015, claimant had been hauling grain for Jordan around one month. Three months prior to his accident, claimant also hauled grain for Jordan about one month.

Claimant did not seek medical treatment for his injuries on the date he was injured, because he thought he would be fine but might hurt for a while. He sought medical treatment three weeks later. One week after claimant saw the doctor, Paul called to say there was no more work and claimant needed to find a new job. The details of claimant's medical treatment are omitted because they are not germane to the issues on appeal.

Claimant testified he was uncertain how much he was paid by the Leikers during the 26 weeks prior to his accident. He did not dispute respondents' proffer that the Leikers paid him $2,485.93 from December 1, 2014, through February 8, 2015. Claimant testified Jordan paid him 25 percent of what each load paid. He testified he was paid with a check from Paul and Cheryl and that he was never paid by Leiker Farms and Trucking, LLC.

Claimant was a family friend of Paul and Cheryl. At the request of Paul and Cheryl, claimant helped on their farm and worked alongside Jordan.

Claimant testified he had no idea who his employer was and he took orders from just about everybody in the Leiker family. He testified he was hired by Jordan to drive trucks, but also testified he was hired by Paul to drive trucks.

Paul Leiker's Testimony

Paul testified he and Cheryl have a farming operation with wheat, milo, cattle, soybeans, and hay. Paul also does custom spraying, swathing and baling for others and some trucking for his son to help out when he gets behind. Paul does not have workers compensation insurance.

Claimant started working for Paul in 2014, doing fence work, hauling bales and working with cattle. Paul paid claimant around $400 from a personal checking account in December. Paul testified that he would have issued a 1099 form to claimant if he was paid more than $600 in 2014. Paul's financial records stipulated into evidence do not include a 2014 1099 form issued to claimant.

According to Paul, claimant was working for him at the time of the accident. Paul paid claimant, even though claimant hauled for Jordan under his KCC number and Jordan contracted to perform services for someone else. Paul explained he was getting paid for hauling the grain to the ethanol plant using his truck and Jordan was not getting paid.

Paul testified he bought a Peterbilt truck in November or December, 2014. In March or April, 2015, Paul transferred the truck to Jet Investments, LLC (Jet). Paul and Cheryl have owned Jet for eight years. Paul started Jet as an oil company investment and when he started hauling freight out-of-state in April, he transferred the Peterbilt title to Jet for liability reasons. Jet does not have workers compensation insurance.

In 2015, claimant worked on Paul's trucks, changing tires and greasing them, and worked on the Peterbilt. Claimant performed the work on the Peterbilt for Paul individually until it was transferred to Jet. On the day of the accident, claimant used Paul's Peterbilt, as was the grain trailer it was pulling. Paul was unsure what claimant was paid in 2015. He testified claimant was not a full time employee, but worked as needed.

Paul's sons work for him, doing all kinds of farm work, whatever needs to be done. For payment Paul pays for his sons' gas and insurance, and gives them money when they want to go out. Brandon gets paid by using Paul's equipment or by Paul performing work for him.

Allen Voss began driving the Peterbilt truck after ownership was transferred from Paul to Jet in March or April 2015. Mr. Voss drove approximately 14 weeks in 2015. Paul

testified use of the Peterbilt truck grosses $4,000 each week and Mr. Voss is paid $1,500 to $2,000 from the gross receipts. Paul estimated Mr. Voss would be paid more than $20,000 in 2015.

Paul and Cheryl's 2013 and 2014 income tax returns were placed into evidence, along with 1099 forms from 2010 through 2014. The 2014 tax return includes a W-2 form showing Cheryl was paid $3,000 as Paul's employee.

Claimant questioned Paul about several individuals who worked for him in 2014. Trey Murphy drove a truck for Paul and Cheryl. Mr. Murphy was paid by the hour. In 2014, Brian Smith drove a truck for Paul during wheat harvest and was paid by the hour. A 1099 was issued to Mr. Smith for $2,859. Mr. Smith also did some work for Jordan using Paul's truck.

For the last three to four years, Paul hired Terry Krannewetter to drive a truck during harvest. Paul paid Mr. Krannewetter by check and at $10 or $12 per hour. The record does not have a 1099 issued to Mr. Krannewetter. Benjamin Burlson has worked and will work for Paul during the harvest. Paul will pay Mr. Burlson $10 per hour during 2015. A 1099 form for 2014 shows Mr. Burleson was paid $1,500. Paul testified that in 2014, he paid Brandon Legleiter $31,800 for constructing a shed, Dreiling Field Service $4,325 for repairing farm equipment and trucks, Flatlander Dirtworks $12,107 for dirt work and Henry VonLintel $840 to do some swathing.

Paul has been partners for ten years with Don Boos in Boos & Leiker, LLC.[2] Boos and Leiker, LLC owns cattle and Paul also owns cattle individually. Paul testified Boos and Leiker, LLC has no employees.

Jordan Leiker's Testimony

Jordan is self-employed. He drives a truck, custom farms, and has a cattle operation. Jordan did business individually as Leiker Farms & Trucking until January or February 2015, when he formed Leiker Farms & Trucking, LLC. Leiker Farms & Trucking, LLC also does trucking, farming and cattle. Jordan is the owner-operator. Jordan has no workers compensation insurance and his company is solvent. He does not pay himself, but he takes what he needs from the accounts to pay his expenses. He does not know how much he pays himself, maybe $500 per week. Jordan lives with Paul and Cheryl and pays no rent.

At the time claimant was injured, Jordan had a contract with the Scoular Company, a grain-brokering company. Scoular contracted with Jordan to haul milo to the White Energy ethanol plant. Jordan did business hauling grain for Scoular as Leiker Farms and

[2] Paul also referred to Boos and Leiker, LLC as B&L Cattle Company, LLC.

Trucking in 2014, and as Leiker Farms and Trucking, LLC after it was created in 2015. Jordan could not haul all of the grain alone so he used Paul's truck to haul the grain. Both claimant and Paul hauled grain for Jordan.

Around February 2015, Jordan quit hauling grain and now hauls refrigerated goods. Paul still hauls using Jordan's ICC number. Jordan is paid for the load, then pays his father.

In 2014, Chase Anderson leased to haul grain for Jordan as an independent contractor. Mr. Anderson used his own truck, his own trailer and was self-employed, working for himself. Jordan could decide whether to give Mr. Anderson loads or not. Jordan told Mr. Anderson where to pick up and deliver the loads. Jordan testified he could not fire Mr. Anderson. In 2014, Mr. Anderson was paid a maximum of $4,000 per week, and a minimum of $50 to $100. Jordan testified Mr. Anderson earned more than $20,000 in 2014.

Scott Roenne hauled grain for Jordan two or three weeks during August 2014. Mr. Roenne was paid around the same amounts as Mr. Anderson, but he did not earn more than $20,000 in 2014. Paul hauled grain for Jordan in 2014 and 2015. If Jordan had more than what he could haul himself, he paid Paul, Mr. Anderson, Mr. Roenne and claimant to haul. Jordan paid Mr. Anderson and Mr. Roenne, together, more than $20,000 in 2014. Jordan does not know if Paul has been paid more than $20,000 in 2015.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[4]

K.S.A. 44-505, in part, states:

> (a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

[3] K.S.A. 2013 Supp. 44-501b(c).

[4] K.S.A. 2013 Supp. 44-508(h).

> (1) Agricultural pursuits and employments incident thereto, other than those employments in which the employer is the state, or any department, agency or authority of the state;
>
> (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;
>
> (3) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer has not had a payroll for a calendar year and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as a part of the total gross annual payroll of such employer for purposes of this subsection;

In *Slusher*,[5] Wonderful House opened for business in 2007, the year Slusher was injured, and had an annual payroll of less than $20,000. Wonderful House had no payroll in the previous year, 2006. The Board ruled Wonderful House was exempt from workers compensation under K.S.A. 44-505(a)(3). In the Board's analysis, Wonderful House was exempt because the restaurant had no payroll in 2006 and neither had, nor expected to have, a total gross payroll of more than $20,000 in the current calendar year, 2007. The Kansas Court of Appeals affirmed the Board's ruling.

In order for claimant to be covered by the Act, claimant's employer must have a gross annual payroll of more than $20,000 in 2014 and an estimated total gross annual payroll for 2015 more than $20,000 for all employees, excluding employees who are members of the employer's family by marriage or consanguinity. The first task is to determine who was claimant's employer.

The businesses of Paul, Cheryl and Jordan are intertwined. Jordan had his own business, but used a Peterbilt truck and grain trailer owned by Paul. No evidence was presented as to when Leiker Farms and Trucking, LLC was formed other than in January or February, 2015. Therefore, it is unknown if claimant was injured before or after the LLC was formed.

---

[5] *Slusher v. Wonderful House Chinese Restaurant, Inc.*, 42 Kan. App. 2d 831, 217 P.3d 11 (2009).

Paul testified he was claimant's employer and paid his wages even though claimant drove for Jordan. Yet, Paul's financial records contained no checks, W-2 or 1099 forms indicating he paid claimant. Paul worked for Jordan and as noted above, provided equipment for Jordan to use. At one point Paul testified he was getting paid for hauling the grain to the ethanol plant because it was his truck and that Jordan was not getting paid.

Claimant provided conflicting testimony concerning who was his employer. He testified he was asked to haul grain by Jordan, he worked for Paul and Cheryl, was paid by Paul, took orders from any of the Leikers and was uncertain who his employer was.

There are three possible employers for claimant: Jordan Leiker, Paul and Cheryl or a joint venture of Jordan, Paul and Cheryl Leiker. This Board Member finds that no matter which of the aforementioned is claimant's employer, claimant failed to prove he was covered by the Act.

There is insufficient evidence showing Jordan paid $20,000 in wages to non-family members in 2014. No financial records of Jordan or Leiker Farms and Trucking, LLC were placed into evidence, which makes it difficult to ascertain what wages Jordan or his LLC paid in 2014 and 2015. Jordan used the services of, Paul, claimant, Mr. Anderson and Mr. Roenne in 2014. Paul was a family member and his wages are not counted toward the $20,000 threshold. Mr. Anderson was paid in excess of $20,000 in 2014, but Jordan's testimony that Mr. Anderson was an independent contractor is uncontroverted. It is unknown how much Jordan paid claimant in 2014. Jordan testified he did not pay more than $20,000 to Mr. Roenne in 2014. Consequently, if Jordan was claimant's employer, claimant failed to prove Jordan's 2014 gross annual payroll was more than $20,000, as required by K.S.A. 44-505(a).

If Paul and Cheryl were claimant's employers, there is insufficient evidence they had a $20,000 gross annual payroll in 2014, as required by K.S.A. 44-505(a). The evidence shows the only possible employees of Paul and Cheryl in 2014 were Cheryl, claimant, Mr. Krannewetter and Mr. Burlson. Mr. Krannewetter and Mr. Burlson were paid $10 to $12 per hour during harvest. No 1099 or W-2 forms were produced showing what claimant and Mr. Krannewetter were paid in 2014 and Mr. Burlson's 1099 showed he was paid $1,500. The $3,000 paid to Cheryl in 2014 does not count toward the $20,000 threshold as she is a family member.

Simple arithmetic shows that even if Jordan, Paul and Cheryl were engaged in a joint venture, the 2014 gross annual payroll of the joint venture was not more than $20,000. This Board Member acknowledges there was evidence that Jet Investments, LLC, owned by Paul, may have had a gross annual payroll in 2014 and an estimated payroll in 2015 of more than $20,000. However, Jet was not a party to this claim when the SALJ issued his preliminary hearing order and its financial records were not placed into evidence. Morever, no evidence was presented showing claimant worked for Jet.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant is not covered by the Workers Compensation Act because his employer did not have had a gross annual payroll in 2014 and an estimated payroll in 2015 of more than $20,000, excluding family members as required by K.S.A. 44-505(a).

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Special Administrative Law Judge C. Stanley Nelson dated June 26, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

_____
HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
matt@byinjurylaw.com
colleen@byinjurylaw.com

Christopher J. Shepard, Attorney for Respondent and its Insurance Carrier
cshepard@wcrf.com
aoberle@wcrf.com

Honorable C. Stanley Nelson, Administrative Law Judge

[6] K.S.A. 44-534a(2).